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UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**

98 APR 22 PM 12:45

U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:

Bonnie D. Raines,

Debtor.

C/A No. 98-01463-W

**ORDER**

Chapter 7

THIS MATTER comes before the Court upon the objection of the creditor, The Royal Treatment, to the Debtor's motion to avoid the judicial lien of The Royal Treatment pursuant to 11 U.S.C. §522(f).<sup>1</sup> After receiving the testimony, carefully considering all the evidence and weighing the credibility of the witnesses, the Court makes the following Findings of Fact and Conclusions of Law.

#### **FINDINGS OF FACT**

On April 8, 1987, the Debtor and her then husband, Robert D. Raines, jointly purchased the Debtor's current residence in Blythewood, South Carolina for approximately \$152,600. In 1991 or 1992, the Debtor refinanced the first mortgage on the home in the approximate amount of \$141,000. On March 23, 1997, The Royal Treatment obtained a judgment against the Debtor in the amount of \$1,852.00 which became a judicial lien against the Debtor's ½ interest in the residence when it was entered into the judgment rolls.

On February 20, 1998, the Debtor filed a voluntary Chapter 7 petition. The Debtor's schedules and statements reflect a first mortgage on the residence to First Union Mortgage in the amount of \$132,405.00 and place a value of the residence at \$134,600.00.

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<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

*JW-1 of 6-*

On March 4, 1998, the Debtor filed a motion to avoid the judicial lien of The Royal Treatment in the amount of \$1,900.00. However, the motion did not state a value of the Debtor's interest in the residence, the total amount of unavoidable senior liens or the amount of the exemption that is impaired. On March 23, 1998, The Royal Treatment filed an objection to the Debtor's motion to avoid its lien. The Court conducted a hearing on the motion on April 14, 1998 at which time the Debtor testified that the value of the residence was between \$134,000.00 and \$140,000.00. The Royal Treatment introduced the testimony of James F. Johnston, III, a real estate appraiser ("Mr. Johnston"), who testified that the value of the residence was \$170,000.00. On April 2, 1998, the Debtor's Chapter 7 Trustee filed a Report of No Distribution.

### CONCLUSIONS OF LAW

Section 522(f)(1) provides in part that "the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is (A) a judicial lien..." 11 U.S.C. §522(f)(1)(A). In cases filed on or after October 22, 1994, §522(f)(2) as amended states:

- (2)(A) For the purposes of this subsection, a lien shall be considered to impair an exemption to the extent that the sum of-
- (i) the lien,
  - (ii) all other liens on the property; and
  - (iii) the amount of the exemption that the debtor could claim if there were no liens on the property;
- exceeds the value that the debtor's interest in the property would have in absence of any liens.

11 U.S.C. §522(f)(2).

Section 522(f)(2) sets forth the formula by which the court is to

JW-2-

determine whether a lien impairs an exemption to which the debtor would be entitled. If the sum of the debtor's exemption, all other liens on the property and the judicial lien exceed the value of the debtor's interest in the property, the judicial lien is considered to impair the exemption to which the debtor would be entitled.

In re Huss, 96-74510-B slip op. at (Bkrcty.D.S.C. 1/21/97). Also see Butler, Bankruptcy Handbook, ¶ 21.7 at p. 12-6 (1996).

The first issue that the Court must determine is the value of the Debtor's interest in the residence. While the Debtor testified that the residence was worth between \$134,000.00 and \$140,000.00, she included certain costs of sale, including real estate sales commissions, which this Court has previously held should not be included in this valuation process when a debtor does not intend to sell the collateral.

It is therefore the finding of this Court that when a debtor intends to retain collateral subject to a security interest held by a creditor, the hypothetical costs of sale should not be deducted when attempting to determine the value of the collateral.

In re Childers, 95-76086-W slip op. at (Bkrcty.D.S.C. 3/20/96). In this case, there was no evidence presented that the Debtor is presently attempting to sell her residence.

While the Debtor, in offering her opinion of value, testified that she was a real estate agent for a three year period, the Court finds the testimony and appraisal of Mr. Johnston, the witness for The Royal Treatment, more credible and finds that the value of the residence is closer to \$170,000.00 than the Debtor's estimate. However, the Debtor did testify that there was certain repair work that needed to be made to the house including termite damage, painting, fence repair and some structural improvements. Therefore, giving deference to the Debtor's estimate of the repairs needed and based upon the testimony and appraisal of Mr. Johnston, the Court finds that

*JW-3 -*

the value of the residence for purposes of this motion is \$160,000.00.

The next issue for the Court to determine is the Debtor's interest in the residence. While the Debtor is divorced and neither party presented a copy of the deed into evidence, the uncontroverted testimony indicates that this property is owned as a tenancy in common with the Debtor's ex-husband still a title co-owner with the Debtor on the residence.

Thus, if there are two persons owning a particular property in a tenancy in common, each typically owns an undivided one-half interest in the property. Each may freely transfer or encumber his or her undivided one-half interest without transferring or encumbering the undivided one-half interest owned by the other. Kern v. Weber, 155 So.2d 619, 620 (Fla. 3d DCA 1963).

In re Willoughby, 212 B.R. 1011 (Bkrtcy. M.D.Fl. 1997). Therefore, as tenants in common, the Debtor has a one-half interest in the property.

If the debtor owns only a partial interest in the property, either because of joint ownership or because the debtor has an interest less than a fee simple, such as a life estate, the exemption is applied against the market value of the debtor's partial interest.

4 Collier on Bankruptcy, ¶ 522.09[1] (15th ed. rev. 1997).

South Carolina has opted out of the federal exemptions and therefore pursuant to South Carolina Code §15-41-30(1), the Debtor's aggregate interest up to five thousand (\$5,000.00) dollars may be claimed as her homestead exemption and the Debtor has in fact claimed such an exemption.

Therefore, using the formula Congress provided in §522(f)(2)(A), the judicial lien of The Royal Treatment impairs the Debtor's exemption to the extent of the sum of the judicial lien, all other liens on the property and the amount of the Debtor's exemption exceeds the value of the Debtor's interest in the real estate. Since the judicial lien is in the amount of \$1,852.00, all other

JW-4-

unavoidable liens on the property total \$132,405.00<sup>2</sup> and the amount of the exemption that the Debtor could claim if there were no liens on the property is \$5,000.00, the lien of The Royal Treatment may be avoided in its entirety as the Debtor's interest in the property without these other encumbrances is \$80,000.00 or one-half (1/2) of the \$160,000.00 value of the property.<sup>3</sup>

As first blush this result may seem inequitable. If there were a sale of the property today, the judicial lien and mortgage could be paid off leaving a total of the remaining funds which exceeds the allowable exemptions in the property being split evenly with the Debtor's husband. However, a literal application of the new amendments provides otherwise.

"The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989). This is not one of those rare cases. The legislative report accompanying the 1994 Bankruptcy Reform Act bolsters the literal application of Section 522, confirming that a lack of equity in property need not preclude avoidance of a lien on that property. The House Report states that the amendment to Section 522 overrules decisions involving several scenarios.

...

Congress has made it clear in amending Section 522 that a lien will be deemed to impair an exemption, even when there is no equity in the property, if the sum of all the liens on the property and the hypothetical value of the exemption without liens exceeds the value of the debtor's interest in the property in the absence of liens.

In re Higgins, 201 B.R. 965 (9th Cir. BAP 1996). Additionally, the Bankruptcy Appellate Panel

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<sup>2</sup> While the current amount of the mortgage was not stipulated to, there was no evidence or testimony presented to contradict this amount.

<sup>3</sup>  $\$1,852.00 + \$132,405.00 + \$5,000.00 = \$139,257.00$ ;  $\$139,257.00 - \$80,000.00 = \$59,257.00$ . Therefore, the entire lien of The Royal Treatment is avoidable.

JN 5 -

for the Tenth Circuit has recognized this same result in jointly owned property. As the Tenth Circuit panel stated, "[i]t is not the court's function to legislate but rather to construe and apply the statute." In re Cozad, 208 B.R. 495 (10th Cir. BAP 1997). Therefore, based upon the language of the statute and applying the formula in §522(f)(2), the Court must find that the lien of The Royal Treatment can be avoided. For these reasons, the lien of The Royal Treatment is avoided in its entirety pursuant to §522(f).

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

April 22, 1998.

JN-6

**CERTIFICATE OF MAILING**

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 4-23-98, to:

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JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtor's motion to avoid the judicial lien of The Royal Treatment is granted and the lien is avoided in its entirety.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

April 22, 1998.



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The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 4-23-98, to:

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